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A False Start in Constitutionalizing Lawyer Loyalty in *Canada* (*Attorney General*) v. *Federation* of *Law Societies of Canada*

Amy Salczyn*

I. INTRODUCTION

In *Canada (Attorney General) v. Federation of Law Societies of Canada*, a majority of the Supreme Court of Canada surprised many legal observers by choosing to recognize a new principle of fundamental justice pursuant to section 7 of the *Canadian Charter of Rights and Freedoms*:¹ a lawyer's duty of commitment to a client's cause.² In this article, I critique the majority's choice to recognize this new principle of fundamental justice after first reviewing the Court's reasons and their background.

At issue in this case was the constitutionality of the federal government's statutory regime for preventing and investigating money laundering and terrorist financing to the extent that the regime applied to lawyers. Broadly speaking, the provisions at issue involved: (1) client identification and record-keeping obligations; and (2) authorization for warrantless searches of lawyers' offices. The Court found that these provisions breached both sections 7 and 8 of the Charter in a manner not justifiable under section 1.

* Faculty of Law, University of Ottawa. An earlier draft of this article was presented at the 19th Annual Constitutional Cases Conference at Osgoode Hall Law School on April 8, 2016. The author thanks the attendees of this conference for their helpful feedback as well as Adam Dodek, Carissima Mathen and Vanessa MacDonnell for their insightful comments and suggestions.

¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

² *Canada (Attorney General) v. Federation of Law Societies of Canada*, [2015] S.C.J. No. 7, 2015 SCC 7 (S.C.C.), varg [2013] B.C.J. No. 632 (B.C.C.A.) [hereinafter "*Federation of Law Societies*"].

The decision was a significant victory for the Federation of Law Societies of Canada, which had been resisting the government's attempts to regulate lawyers in this area for roughly 15 years. Not only did the Court find the government's legislation unconstitutional, the majority cited with approval the Federation's leadership in developing its own model rules on money laundering and terrorist financing which have been adopted by all Canadian law societies.

Notwithstanding any victory claimed by the Federation, an awkward precedent was created in this case through the Court's recognition of client commitment as a principle of fundamental justice. To be sure, a duty of commitment to a client's cause or, stated in its more familiar form, a duty of zealous advocacy, is well-recognized in legal ethics scholarship and in the Court's jurisprudence on lawyer conflicts of interest. The problem, however, is that such a duty is internally limited by what the law demands otherwise; to the extent that lawyers must be committed to clients they must do so *within the limits of the law*. This qualification is essential and uncontroversial. No one disputes, for example, that a lawyer cannot knowingly assist a client in committing a criminal act or that a lawyer cannot suppress evidence contrary to applicable disclosure laws when representing a client in litigation. These examples reflect the fact that the lawyer's partisan role *vis-à-vis* a client is informed by and, indeed, limited by, other legal constraints.

The consequence of this reality is that elevating a duty of client commitment to a principle of fundamental justice results in a muddled analytical framework under section 7: the constitutionality of a law is attempted to be evaluated by a principle that itself recognizes legality as a legitimate boundary. Stated otherwise, the fact that lawyers' zealous advocacy ends where other legal constraints begin make it illogical to then try to use zealous advocacy to assess the legitimacy of these other legal constraints. There is no foothold in the concept of zealous advocacy itself from which to adjudge other laws, as the concept takes such laws to trump its requirements and permissions, merely due to their existence.

As explored in more detail below, the majority's efforts to refine the duty of commitment by referring to less restrictive law society regulation in this area and to risks relating to the disclosure of solicitor-client information do not provide a satisfactory solution to this problem. I further argue that another layer of confusion is added by the use of subjective client perceptions about the effect of state regulation on a lawyer-client relationship as a basis, in and of itself, for finding an unconstitutional interference with a lawyer's duty of commitment to a client's cause.

Drawing from the work of Alice Woolley on independence of the bar as a constitutional principle, I argue that a better route to capturing what is at stake when the government intrudes on the lawyer-client relationship is to use independence of the bar as the applicable principle of fundamental justice and to understand independence of the bar to only justify those government intrusions on the lawyer-client relationship that are directed to protecting or promoting the integrity of the legal system and the lawyer's role in providing clients appropriate access to the legal system. To the extent that the government wishes to regulate lawyers in order to pursue other policy ends (and the regulation engages the lawyer's life, liberty or security), the regulation should be viewed as a violation of section 7 and the legitimacy of the government's pursuit of these other ends, should, in my view, be considered under section 1.

II. THE STATUTORY PROVISIONS AT ISSUE

As Justice Cromwell observed in the Supreme Court of Canada's decision in this case, "[t]he legislative scheme out of which this appeal arises is complex and a good grasp of how its provisions affect lawyers and clients is necessary in order to understand the issues on appeal."³ In view of this reality, this section outlines the relevant details of the statutory provisions at issue and the procedural context.

At issue were particular provisions of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (the "Act") and associated regulations (the "Regulations") that sought to: (1) impose new client identification and record-keeping obligations on lawyers; and (2) provide new powers to conduct warrantless searches and seizures of lawyers' offices (collectively, hereinafter, "the Regime").⁴

Although lawyers were the focus of this proceeding, the measures instituted by the Regime also apply more broadly to other financial intermediaries such as casinos, life insurance companies, securities dealers, real estate brokers and accounting firms.⁵ Moreover, the Regime creates many other powers and obligations in addition to the two

³ *Id.*, at para. 10.

⁴ *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17, ss. 2 "legal counsel", 3, Part 1, ss. 5(i)-(j), 6-7, 9-9.1, 9.6, 10.1-11, 62-65, 65.1, 74 [hereinafter "Act"] and *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184, ss. 1(2) "funds", "receipt of funds record", 11.1, 33.3-33.5, 59.4, 64-67, 68-70 [hereinafter "Regulation"].

⁵ See, for example, Act, *id.*, at s. 5 and Regulation, *id.*, at s. 11.2-52.

mentioned above, including requiring the reporting of cross-border movement of currency and other monetary instruments.⁶ The Act also creates an agency — the Financial Transactions and Reports Analysis Centre of Canada (“FINTRAC”) — to ensure compliance with the Act and to collect reported information.⁷

1. Client Identification and Record-Keeping Provisions

The client identification and record-keeping provisions at issue required lawyers and law firms who receive or pay funds on behalf of a client (other than professional fees, disbursements, expenses or bail) to verify the identity of the client.⁸ In circumstances in which funds of \$3,000 or more are received, the Regime also required lawyers to:

- (1) Keep a “receipt of funds record” (unless the amount is received from a financial entity or a public body) which must include the name of the person or entity from whom the funds were received (unless already apparent in other records required under regime); the date of the transaction; details about “any account that is affected by the transaction”; the purpose and details of the transaction; the amount and currency of the funds received; and where the funds are received in cash, how the cash was received (*i.e.*, “by armoured car, in person, by mail or in any other way”).⁹
- (2) Take additional steps to confirm the identity or existence of the client. For example, in the case of a corporation, the lawyer must confirm the corporation’s existence and take reasonable measures to accurately ascertain the names of all directors of the corporation and the names and addresses of all persons who own or control, directly or indirectly, 25 per cent or more of the shares of the corporation by referring to its certificate of corporate status. The identity of individuals can be confirmed by referring to government issued identification like a birth certificate, driver’s licence or passport.¹⁰

Where a lawyer receives funds from the trust account of another lawyer, the Regulations waive the requirement to confirm the identity or

⁶ See, for example, Act, *id.*, at s. 12.

⁷ See *id.*, at ss. 40-72.

⁸ Act, *id.*, at s. 6.1, Regulation, *supra*, note 4, at s. 33.3.

⁹ Regulation, *id.*, at ss. 1(2) “receipt of funds record,” 33.4.

¹⁰ *Id.*, at ss. 11.1, 59.4 and 64-67.

existence of the source of the funds and the lawyer is only required to prepare a partial “receipt of funds record”.¹¹ A failure to meet the above obligations can expose a lawyer to a fine of up to \$500,000 or imprisonment for up to five years.¹²

2. Search and Seizure Provisions

The search and seizure provisions allow FINTRAC (the administrative agency created by the Act) to enter a law office, “at any reasonable time”, to examine records kept in relation to the Regime and to reproduce any record.¹³ The provisions specifically authorize the search of “any computer system or data processing system” and also allow authorities to use photocopying equipment on the premises for their purposes.¹⁴ The Act provides that this search and seizure may be warrantless, unless the premises to be searched is a dwelling-house.¹⁵ As a result, a warrant would be required for a search of a lawyer’s home office.

The Act provides some protection for privileged documents. Specifically, a lawyer is permitted to claim solicitor-client privilege in respect of documents that a FINTRAC representative “is about to examine or copy” during a search.¹⁶ If privilege is claimed, the lawyer is required to place the document under seal and retain it until a judicial hearing can be held.¹⁷ The hearing must be requested by the client or the lawyer within 14 days of the search (and take place within 21 days).¹⁸ The Act also requires a FINTRAC representative conducting a search of a lawyer’s office to refrain from examining or making copies of any document without providing “reasonable opportunity” for a claim of solicitor-client privilege to be made.¹⁹ Moreover, if a lawyer claims solicitor-client privilege, the lawyer is required to provide the client’s last known address to the FINTRAC representative so that the representative “may endeavour to advise the client of the claim of privilege that has been made on their behalf and may by doing so give the client an

¹¹ See Regulation, *id.*, at ss. 59.4(2) and 33.5.

¹² Act, *supra*, note 4, at s. 74.

¹³ *Id.*, at ss. 62-63.1.

¹⁴ *Id.*, at s. 62.

¹⁵ *Id.*, at s. 63.

¹⁶ *Id.*, at s. 64(2).

¹⁷ *Id.*, at s. 64(3).

¹⁸ *Id.*, at s. 64(4).

¹⁹ *Id.*, at s. 64(9).

opportunity, if it is practicable within the time limited by this section, to waive the privilege before the matter is to be decided by a judge”.²⁰

The search and seizure provisions also authorize FINTRAC to disclose any information found during a search to “the appropriate law enforcement agencies” for the purpose of aiding an investigation or prosecution of an offence under the Act.²¹ However, as a result of amendments made to the Act following the British Columbia Court of Appeal decision in this case and before the Supreme Court hearing, the Act only allows law enforcement to use the information received as evidence of a contravention of the client identification and record-keeping obligations imposed by the Regime.²²

3. Procedural History

The procedural history of this case is arguably as complex as the Regime at issue. Although the Supreme Court decision was released in 2015, lawyers were first subject to the Regime in 2001 when they were required to report “suspicious transactions” to FINTRAC.²³ In response to this development, the Federation and several provincial law societies initiated multiple parallel court proceedings challenging the constitutional validity of the regime.²⁴ In five provinces, the Federation and law societies were successful in obtaining interlocutory injunctions that exempted lawyers from the Regime until the merits of the constitutional challenges could be determined.²⁵ In 2002, the Federation and the Attorney General of Canada reached an agreement allowing the matter to proceed through one binding test case in British Columbia.²⁶

²⁰ *Id.*, at s. 64(10).

²¹ *Id.*, at s. 65(1).

²² *Id.*, at s. 65(3).

²³ *Federation of Law Societies*, *supra*, note 2, at para. 23.

²⁴ *Id.*

²⁵ *Law Society of British Columbia v. Canada (Attorney General)*, [2001] B.C.J. No. 2420, 2001 BCSC 1593 (B.C.S.C.), *affd* [2002] B.C.J. No. 130 (B.C.C.A.); *Federation of Law Societies of Canada v. Canada (Attorney General)*, [2001] A.J. No. 1697 (Alta. Q.B.); *Federation of Law Societies of Canada v. Canada (Attorney General)*, [2002] O.J. No. 17, 57 O.R. (3d) 383 (Ont. S.C.J.); *Federation of Law Societies of Canada v. Canada (Attorney General)*, [2002] N.S.J. No. 199, 2002 NSSC 95 (N.S.S.C.); *Federation of Law Societies of Canada v. Canada (Attorney General)*, [2002] S.J. No. 200, 2002 SKQB 153 (Sask. Q.B.).

²⁶ *Federation of Law Societies*, *supra*, note 2, at para. 23.

The Attorney General also consented to interlocutory injunctions in jurisdictions in which injunctions had not yet been granted.²⁷

Before the matter first came before the Supreme Court of British Columbia in 2011, the Regime went through several changes. In 2003, for example, lawyers were formally exempted from the application of the Regime through the passage of a new regulation.²⁸ However, in December 2008, new regulations were put in place making lawyers subject to the Regime once again.²⁹ By this time, the Regime included the client identification, record-keeping and search and seizure provisions at issue before the Supreme Court.³⁰ However, the Regime has never actually been applied to lawyers, because the Federation and the Attorney General of Canada agreed to another consent order in 2010 exempting lawyers, retroactive to December 2008, pending a determination on the constitutionality of the current provisions.³¹

Also before the matter came before the Supreme Court of British Columbia, Canadian law societies developed their own regulations aimed at preventing lawyers from being used as intermediaries for money laundering or terrorist financing. All Canadian law societies now enforce client identification and verification rules based on model rules developed by the Federation in 2008.³²

Although the client identification and verification rules adopted by Canadian law societies cover much of the same territory as the federal government's statutory regime, these professional conduct rules are, as observed by the Supreme Court of Canada, "narrower in scope" than the Regime.³³ For example, the Regime does not exempt funds paid, received or transferred by electronic funds transfer from its client identification and record-keeping obligations, while professional conduct

²⁷ *Federation of Law Societies of Canada v. Canada (Attorney General)*, [2011] B.C.J. No. 1779, 2011 BCSC 1270, at para. 19 (B.C.S.C.), aff'd [2013] B.C.J. No. 632 (B.C.C.A.) [hereinafter "*Federation of Law Societies BCSC*"].

²⁸ *Federation of Law Societies of Canada v. Canada (Attorney General)*, [2013] B.C.J. No. 632, 2013 BCCA 147, 359 D.L.R. (4th) 1, at para. 18 (B.C.C.A.), var'd [2015] S.C.J. No. 7 (S.C.C.) [hereinafter "*Federation of Law Societies BCCA*"].

²⁹ *Id.*, at para. 21.

³⁰ *Id.*

³¹ *Federation of Law Societies BCSC*, *supra*, note 27, at para. 41.

³² Federation of Law Societies of Canada, *Model Rules to Fight Money Laundering and Terrorist Financing*, online: Federation of Law Societies of Canada <<http://flsc.ca/national-initiatives/model-rules-to-fight-money-laundering-and-terrorist-financing/>> and Federation of Law Societies of Canada, *Federation fights money laundering with new "know-your-client" model rule*, online: Federation of Law Societies of Canada <<http://flsc.ca/federation-fights-money-laundering-with-new-know-your-client-model-rule/>>.

³³ *Federation of Law Societies*, *supra*, note 2, at para. 107.

rules do contain such an exemption. By way of another example, the professional conduct rules do not include an obligation to produce and retain a “receipt of funds”, like that contained in the Regime.³⁴

III. LEGAL PROCEEDINGS

1. Trial

As agreed to by the Federation and the Attorney General, the constitutionality of the provisions was first considered in the context of a petition before the Supreme Court of British Columbia wherein the Federation alleged that the Regime breached both section 7 and section 8 of the Charter.

Following a six-day hearing, Gerow J., who also had the benefit of a written record spanning 15,000 pages and which included 50 affidavits and exhibits, ruled in favour of the Federation.³⁵ With respect to section 7, Gerow J. concluded that the impugned client identification and record-keeping provisions engaged the liberty interests of both lawyers and their clients.³⁶ She further concluded that the Regime jeopardized these liberty interests in manner that interfered with solicitor-client privilege — a recognized principle of fundamental justice.³⁷ In view of this holding on section 7, Gerow J. concluded it was unnecessary to consider whether the search and seizure provisions also violated section 8.³⁸

With respect to section 1, Gerow J. found that the section 7 infringement was not justified. In large part, she based this conclusion on the fact that the provincial and territorial law societies had already adopted less intrusive regulations in this area.³⁹ Regarding remedy, Gerow J. read down several of the impugned provisions to exclude lawyers and law firms and severed those provisions that dealt specifically with the legal profession, declaring them to be of no force and effect.⁴⁰

³⁴ See *id.*, at para. 107 for more examples.

³⁵ *Federation of Law Societies BCSC*, *supra*, note 27, at para. 75.

³⁶ *Id.*, at paras. 84-144.

³⁷ *Id.*, at para. 144.

³⁸ *Id.*, at paras. 145-146.

³⁹ *Id.*, at para. 213.

⁴⁰ *Id.*, at para. 215.

2. Court of Appeal

Writing for the majority at the British Columbia Court of Appeal, Hinkson J.A., as he then was, largely agreed with Gerow J.'s decision below. One significant difference, however, was his conclusion that the relevant principle of fundamental justice engaged was the "independence of the Bar" as opposed to solicitor-client privilege.⁴¹ Although independence of the bar had not previously been recognized as a principle of fundamental justice, Hinkson J.A. found that it met the requirements for recognizing a new principle as set out by the Supreme Court of Canada in *Malmo-Levine*.⁴²

In his section 7 analysis, Hinkson J.A. found that the Regime engaged the liberty interests of clients and lawyers in a manner that did not accord with the independence of the bar insofar as the regime imposed "conflicting interests and corresponding obligations on the lawyer, regarding clients' interests, state interests and lawyers' liberty interests".⁴³ With respect to section 1, Hinkson J.A. did find that Gerow J. erred in concluding that there was no rational connection between the objective of the Regime and the means employed, but held that this error did not detract from her analysis on the second or third elements of the second part of the *Oakes* test.⁴⁴

Like the trial decision, the majority of the Court of Appeal found it unnecessary to address whether the Regime also violated section 8 of the Charter.⁴⁵

Concurring reasons, authored by Frankel J.A., agreed with the majority reasons except for Hinkson J.A.'s conclusion that the Regime engaged the section 7 liberty interests of individual clients. On this issue, Frankel J.A. concluded that "the connection between the requirements imposed on lawyers and the possibility of the client being charged is far too tenuous to engage the client's liberty interests."⁴⁶

3. Supreme Court of Canada

At the Supreme Court, Cromwell J., writing for the majority, held that the Regime violated both sections 7 and 8 of the Charter and could not be saved under section 1.

⁴¹ *Federation of Law Societies BCCA*, *supra*, note 28, at para. 118.

⁴² *Id.*, at paras. 105-114.

⁴³ *Id.*, at paras. 116-125.

⁴⁴ *Id.*, at paras. 126-159.

⁴⁵ *Id.*, at para. 162.

⁴⁶ *Id.*, at para. 168.

In contrast to the approach taken by the courts below, Cromwell J. first considered whether the Regime's search and seizure provisions infringed section 8. On section 8, Cromwell J. rejected the Attorney General's submission that the search and seizure provisions were reasonable because "they relate to a limited class of documents for a narrow, regulatory purpose and there are appropriate safeguards to protect solicitor-client privilege"⁴⁷ and instead found that:

... The regime authorizes sweeping law office searches which inherently risk breaching solicitor-client privilege. It does so in a criminal law setting and for criminal law purposes. In my view, the constitutional principles governing these searches are set out in the Court's decision in *Lavallee*, and this scheme does not comply with them.⁴⁸

In its 2002 decision, *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, the Supreme Court of Canada had considered the constitutionality of a section of the *Criminal Code* which had set out a procedure for determining a claim of solicitor-client privilege in relation to documents seized from a law office under a warrant.⁴⁹ The majority of the Court struck down the section, finding that the procedure which it set out "unconstitutionally jeopardize[d] solicitor-client privilege" pursuant to section 8 of the Charter.⁵⁰ In the course of its reasons, the majority also articulated a number of general principles which were to govern the legality of law office searches "as a matter of common law until Parliament, if it sees fit, re-enacts legislation on the issue" and which "should also guide the legislative options that Parliament may want to address in that respect".⁵¹

Among other things, Cromwell J. highlighted two of the general principles set out in *Lavallee* as being particularly relevant to the case at bar: (1) that prior judicial authorization should be required before authorities can search a law office, unless there are no other reasonable alternatives to the search and (2) that, unless otherwise specified by a warrant, "all documents in possession of a lawyer must be sealed before being examined or removed from a lawyer's possession".⁵² With respect

⁴⁷ *Federation of Law Societies*, *supra*, note 2, at para. 34.

⁴⁸ *Id.*, at para. 35.

⁴⁹ *Lavallee, Rackel & Heintz v. Canada (Attorney General)*; *White, Ottenheimer & Baker v. Canada (Attorney General)*; *R. v. Fink*, [2002] S.C.J. No. 61, 2002 SCC 61 (S.C.C.), affg [2000] O.J. No. 4549 (Ont. C.A.) [hereinafter "*Lavallee*"].

⁵⁰ *Id.*, at para. 9.

⁵¹ *Id.*, at para. 49.

⁵² *Federation of Law Societies*, *supra*, note 2, at paras. 54-55.

to the first principle, he observed that, except with respect to home offices, the search and seizure provisions “do not require prior judicial authorization, let alone impose a statutory requirement that there be no other reasonable alternative”.⁵³ Regarding the second, he noted that the Regime provided that “examining and copying in a law office by the official only stops at the point at which a claim of solicitor-client privilege is asserted by a lawyer on behalf of a named client” and this approach “greatly elevates the risk that privileged material will be examined”.⁵⁴ Justice Cromwell further noted that the requirements for the lawyer to disclose the client’s name and last known address as part of the process of asserting privilege risked, in and of themselves, obliging the lawyer to breach privilege.⁵⁵ He held that this infringement of section 8 was not saved under section 1 given that it was not minimally impairing: specifically, the search and seizure provisions could have included the protections for solicitor-client privilege outlined in *Lavallee*.⁵⁶

With respect to section 7, the majority held that the Regime’s provisions engaged the liberty interests of lawyers in a manner that was not in accordance with a lawyer’s duty of commitment to the client’s cause — a duty which the Court recognized, for the first time, to be a principle of fundamental justice.⁵⁷

Rather than adopt the Court of Appeal’s section 7 analysis rooted in recognizing the independence of the bar as a principle of fundamental justice, Cromwell J. grounded his analysis in what he characterized as a narrower principle included within the concept of lawyer independence: “that the state cannot impose duties on lawyers that interfere with their duty of commitment to advancing their clients’ legitimate interests”.⁵⁸

In applying the three-part *Malmo-Levine* test to this narrower principle, Cromwell J. held:

- (1) “The duty of commitment to the client’s cause has been recognized by the Court as a distinct element of the broader common law duty of loyalty and thus unquestionably is a legal principle.”⁵⁹

⁵³ *Id.*, at para. 54.

⁵⁴ *Id.*, at para. 55.

⁵⁵ *Id.*

⁵⁶ *Id.*, at para. 61.

⁵⁷ *Id.*, at para. 70.

⁵⁸ *Id.*, at para. 77.

⁵⁹ *Id.*, at para. 91.

- (2) There is sufficient consensus that the duty is fundamental, given, the importance of clients and the broader public feeling “confident that lawyers are committed to serving their client’s legitimate interest free of other obligations that might interfere with that duty”⁶⁰ and the recognition in various international instruments of “the fundamental importance of preventing state interference with legal representation”.⁶¹
- (3) “While this standard is far from self-applying, it has proven to be sufficiently precise to enable the courts to apply it in widely divergent fact situations [relating to lawyerly conflicts of interest].”⁶² In terms of what the duty of commitment to a client’s cause requires “[i]n the context of state action engaging s. 7 of the *Charter*”, Cromwell J. found that “this means at least that (subject to justification) the state cannot impose duties on lawyers that undermine the lawyer’s compliance with that duty, either in fact or in the perception of a reasonable person, fully apprised of all the relevant circumstances and having thought the matter through.”⁶³

As support for finding the Regime to be inconsistent with a lawyer’s duty of commitment, the majority pointed to the fact that the Regime (1) required lawyers to collect and retain “considerably more” information as compared to what law societies themselves deemed necessary in order to guard against money laundering and terrorist financing and (2) did not contain adequate protection for solicitor-client privilege, for the reasons outlined in the section 8 analysis.⁶⁴ In view of these two realities, Justice Cromwell concluded:

... a reasonable and informed person, thinking the matter through, would perceive that these provisions in combination significantly undermine the capacity of lawyers to provide committed representation. The reasonable and well-informed client would see his or her lawyer being required by the state to collect and retain information that, in the view of the legal profession, is not required for effective and ethical representation and with respect to which there are inadequate protections for solicitor-client privilege.⁶⁵

⁶⁰ *Id.*, at para. 96.

⁶¹ *Id.*, at para. 101.

⁶² *Id.*, at para. 92.

⁶³ *Id.*, at para. 103.

⁶⁴ *Id.*, at paras. 104-114.

⁶⁵ *Id.*, at para. 109.

With respect to section 1, the majority decision agreed with the conclusion reached by the courts below that the Regime failed the proportionality test and was thus not a justifiable limit on lawyers' section 7 rights.⁶⁶

In brief concurring reasons, McLachlin C.J.C. and Moldaver J. agreed with the majority's analysis with respect to section 8 but disagreed that the lawyer's duty of commitment to the client's cause was sufficiently certain so as to constitute a principle of fundamental justice, observing that "[t]he lawyer's commitment to the client's interests will vary with the nature of the retainer between the lawyer and the client, as well as with other circumstances."⁶⁷

Instead of rooting the section 7 analysis in a duty of a commitment to a client's cause, the Chief Justice and Moldaver J. took the position that the issue "would be better resolved relying on the principle of fundamental justice which recognizes that the lawyer is required to keep the client's confidences — solicitor-client privilege" — noting that this has "already been recognized as a constitutional norm" and that the majority's decision had relied on potential breaches of solicitor-client privilege in grounding its section 7 analysis in a duty of commitment to a client's cause.⁶⁸

IV. ANALYSIS

In identifying and applying a new principle of fundamental justice — "commitment to a client's cause" — the majority approached its section 7 analysis in a manner that departed from the courts below. The reasons suggest that the majority's intention in doing so was to sidestep some of the apparent problems in adopting a broad notion of independence of the bar as the applicable principle of fundamental justice.

More specifically, Cromwell J. wrote that there was "considerable merit" in the Attorney General's submissions which contended, *inter alia*, that "the Court of Appeal's broad definition of the independence of the bar essentially places lawyers above the law ... [and that] [t]he principle of the independence of the bar does not meet any of the three requirements that must be met by a principle of fundamental justice."⁶⁹ Justice Cromwell further suggested that the ultimate merits of these

⁶⁶ *Id.*, at para. 114.

⁶⁷ *Id.*, at para. 119.

⁶⁸ *Id.*, at para. 120.

⁶⁹ *Id.*, at para. 78.

submissions need not be determined as “[t]he narrower understanding of the independence of the bar which relates it to the lawyer’s duty of commitment to the client’s cause is the aspect of the lawyer’s special duty to his or her client that is most relevant to this appeal.”⁷⁰

Unfortunately, the majority’s attempt to simplify the analysis through using a lawyer’s duty of commitment to a client’s cause instead of independence of the bar as the applicable principle of fundamental justice leads to more confusion than clarity.

1. The Trouble with Commitment

The majority’s inspiration for recognizing a lawyer’s duty of commitment as a new principle of fundamental justice did not come from the submissions before it but rather from two of the Court’s previous private law decisions addressing a lawyer’s fiduciary duty to avoid conflicting interests in relation to acting against current or former clients.⁷¹ As is apparent from a reading of these decisions, the concept of a duty of commitment to a client’s cause is simply a restatement of the more familiar concept of a duty of zealous advocacy. In these prior cases, what the Court is concerned about is the danger that a lawyer will “soft peddle” his or her representation of one client because of concern for another client.⁷²

In this case, the majority decision extends this notion of avoiding “soft peddling” from conflicts arising between clients to conflicts arising from compliance with government regulation. Although, at first glance, this may seem like a sensible extension of the principle, it quickly proves to be problematic. The source of the problem is the majority’s failure to seriously grapple with, or even acknowledge, the reality that the duty of commitment to a client’s cause or, stated in its more familiar form, the duty of zealous advocacy, is not an unqualified principle but, rather, is subject to its own internal limitations.

⁷⁰ *Id.*, at para. 80.

⁷¹ *Canadian National Railway Co. v. McKercher LLP*, [2013] S.C.J. No. 39, [2013] 2 S.C.R. 649, 2013 SCC 39 (S.C.C.), revg [2011] S.J. No. 589 (Sask. C.A.) [hereinafter “*McKercher*”] and *R. v. Neil*, [2002] S.C.J. No. 72, 2002 SCC 70 (S.C.C.), affg [2000] A.J. No. 1164 (Alta. C.A.) [hereinafter “*Neil*”].

⁷² In *McKercher*, the Court further clarified that this aspect of the duty of commitment precludes lawyers from “summarily and unexpectedly” firing one client in order to represent another client that, but for the firing, the lawyer would not be able to represent due to a conflict of interest.

The question of how committed a lawyer should be to a client's cause to the exclusion of other interests and demands — like, for example, broader notions of justice — is the subject of significant debate in legal ethics scholarship.⁷³ That said, even the most ardent defenders of lawyer partisanship do not contend that this obligation is unconstrained and never yields to other interests or demands.⁷⁴ They further agree that one *minimum* constraint on a lawyer acting for a client is that the lawyer must act *within the limits of the law*.⁷⁵ Indeed, as a matter of positive law, this constraint has been explicitly embedded into the professional conduct rules that govern lawyers in both Canada and the United States.⁷⁶

Once it is acknowledged that a lawyer's duty of commitment is internally limited by what the law demands otherwise, it starts to become tricky, if not impossible, to use this duty as a meaningful principle of fundamental justice in a section 7 analysis. More specifically, the fact that a lawyer's commitment to a client's cause is recognized to be bounded by legality leads to a logically troubled structure of analysis insofar as it involves attempting to provide a constitutional limit to how the law can regulate lawyers by using a standard that itself refers to the

⁷³ For example, William Simon has prominently argued that lawyers should not primarily orient themselves to being zealous advocates but rather should “take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice” (William H. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Cambridge: Harvard University Press, 1998), at 9). For more recent discussion about the appropriate bounds of the lawyer's role in the Canadian context, see, for example, Alice Woolley, *Understanding Lawyers' Ethics in Canada* (Toronto: LexisNexis Canada, 2011); Trevor C.W. Farrow, “Sustainable Professionalism” (2008) 46 *Osgoode Hall L.J.* 51; and David Tanovich, “Law's Ambition and the Reconstruction of Role Morality in Canada” (2005) 28 *Dal. L.J.* 267.

⁷⁴ See, for example, Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton: Princeton University Press, 2010); Tim Dare, *The Counsel of Rogues? A Defence of the Standard Concept of the Lawyer's Role* (New York: Ashgate Publishing, 2009); and Alice Woolley, *Understanding Lawyers' Ethics in Canada*, *id.*

⁷⁵ See *id.* Although there is debate in legal ethics scholarship about how to understand what exactly it means to follow the law while being a zealous advocate (for example, does the lawyer just have to follow the black-letter of the law or does he or she have to take the “spirit” of the law into account), the idea that lawyers are required to follow the law when representing clients is widely accepted.

⁷⁶ Specifically, Rule 5.1-1 of the Federation of Law Societies of Canada's *Model Code of Professional Conduct* states:

5.1-1 When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy and respect.

Similarly, the Preamble to the American Bar Association's *Model Rules of Professional Conduct* references “the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law”.

law as a limit on its scope. Stated otherwise, the argument starts to look like this:

- (1) X (*i.e.*, a law regulating lawyers) is unconstitutional if,
- (2) X engages lawyer's life, liberty or security interest;
- (3) X requires Y, which interferes with the lawyer's partisan representation of a client; and
- (4) Y is not required by law (*i.e.*, is not required by X or any other law).

The reason that (4) is stated as such is because if Y is required by law, it is, by definition, not an interference with a lawyer's duty to zealously represent a client *within the limits of the law*. As noted in the introduction to this article, there is no foothold in the concept of zealous advocacy itself from which to adjudge other laws, as the concept itself takes such laws to trump its requirements and permissions, merely due to their existence.

2. A Few Failed Attempts at Refinement

In its application of a duty of committed representation to the Regime, the majority decision attempts to add some refinement to (4) above, by focusing on two aspects of the Regime: (1) the fact that it is more extensive than the regulations that the law societies put in place in terms of what information must be obtained and recorded; and (2) the fact that solicitor-client privileged information is not adequately protected. Justice Cromwell writes:

... [T]he legislation requires lawyers to gather and retain considerably more information than the profession thinks is needed for ethical and effective client representation. This, coupled with the inadequate protection of solicitor-client privilege, undermines the lawyer's ability to comply with his or her duty of commitment to the client's cause. The lawyer is required to create and preserve records which are not required for ethical and effective representation. The lawyer is required to do this in the knowledge that any solicitor-client confidences contained in these records are not adequately protected against searches and seizures authorized by the scheme. This may, in the lawyer's correctly formed opinion, be contrary to the client's legitimate interests and therefore these duties imposed by the scheme may directly conflict with the lawyer's duty of committed representation.⁷⁷

⁷⁷ *Federation of Law Societies, supra*, note 2, at para. 108.

With this finesse, the structure of the argument appears to have translated into:

- (1) X (*i.e.*, a law regulating lawyers) is unconstitutional if,
- (2) X engages lawyer's life, liberty or security interest;
- (3) X requires Y, which interferes with the lawyer's partisan representation of a client; and
- (4) Y is (a) not required by law society rules *and* (b) fails to adequately protect solicitor-client privileged information.

With respect to the first branch of refinement in this argument (*i.e.*, the majority's reliance on the fact that the Regime is more extensive than law society rules), Cromwell J. is careful to point out that "[p]rofessional ethical standards such as these cannot dictate to Parliament what the public interest requires or set the constitutional parameters for legislation. ... [b]ut [rather] provide evidence of a strong consensus in the profession as to what ethical practice in relation to these issues requires."⁷⁸ Notwithstanding this caveat, however, the majority decision uses the mere existence of less constraining professional conduct rules, "coupled" with the failure to adequately protect solicitor-client privilege, to constitute a reason to find the Regime unconstitutional.

There is no explanation as to why the law society rules are taken to be superior other than the fact that the profession itself "thinks" that the right balance is struck. This reasoning is far from satisfying. As Woolley writes in her analysis of the decision: "the position 'if it is different than what the profession thinks then it is *prima facie* excessive' seems to grant status to self-regulation of the legal profession that the Court purported to reject [elsewhere in the decision]."⁷⁹ This degree of deference to the legal profession's self-imposed standards is also starkly out-of-step with other recent Supreme Court of Canada jurisprudence. Indeed, the very line of case law from which the concept of a "duty of a commitment to a client's cause" is taken involves the Court finding that more rigorous rules for managing conflicts of interest were required than those provided

⁷⁸ *Id.*

⁷⁹ Alice Woolley, "Lawyers' Representation, Lawyers' Regulation and Section 7 of the Charter" ABlawg.ca (February 23, 2015) online: <<http://ablawg.ca/2015/02/23/lawyers-representation-lawyers-regulation-and-section-7-of-the-charter/>>; see also, Alice Woolley, "Fundamental Justice (Sort of Maybe) Requires a Lawyer's Commitment to a Client's Cause" (2015) 34:2 N.J.C.L. 209.

in law society rules in order to ensure that lawyers fulfilled their fiduciary obligations.⁸⁰

The second branch of refinement here (*i.e.*, the reference to inadequate protections for privileged information) would seem to provide a stronger basis for finding that the Regime unduly interferes with the lawyer's duty to be committed to the client's cause. As discussed elsewhere in the decision, there is strong jurisprudential authority for the proposition that solicitor-client privilege should be fiercely protected. In his discussion of the *Lavallee* decision, Cromwell J. observes:

The core principle of the decision is that solicitor-client privilege “must remain as close to absolute as possible if it is to retain relevance”... . This means that there must be a “stringent” norm to ensure its protection, such that any legislative provisions that interfere with the privilege more than “absolutely necessary” will be found to be unreasonable⁸¹

However, if solicitor-client privilege is to do all the work in the section 7 analysis, this would seem to naturally lead to the position taken in the minority reasons that the section 7 analysis “would be better resolved relying on the principle of fundamental justice which recognizes that the lawyer is required to keep the client's confidences — solicitor-client privilege”.⁸²

It is not clear, though, that protecting solicitor-client privilege represents everything at stake in this case. It is not self-evident, for example, that if the search and seizure provisions of Regime were changed to be compliant with *Lavallee* this would render the Regime constitutionally compliant. This is a particularly relevant hypothetical given that the Attorney General specifically requested in this case that, if the Court found that the requirements set out in *Lavallee* were applicable to the Regime, the Court simply read in any *Lavallee* requirements that were absent in the search and seizure provisions.⁸³ The majority rejected this remedial request, noting, *inter alia*, that reading in was not an appropriate constitutional remedy given that there were a variety of legislative approaches to rendering the search and seizure provisions

⁸⁰ For further discussion, see Adam M. Dodek, “Conflicted Identities: The Battle over the Duty of Loyalty in Canada” (2011) 14:2 *Legal Ethics* 193; Simon Chester, *The Conflicts Revolution: Martin v. Gray and Fifteen Years of Change* (Toronto: Heenan Blaikie LLP, 2006); and Amy Salyzyn, “The Judicial Regulation of Lawyers in Canada” (2014) 37 *Dal. L.J.* 481.

⁸¹ *Federation of Law Societies*, *supra*, note 2, at para. 44.

⁸² *Id.*, at para. 120.

⁸³ *Id.*, at para. 64; see also, Factum of the Attorney General of Canada, at paras. 110-118.

constitutional.⁸⁴ It would appear, however, to be a live possibility that the government itself may propose such amendments in the future. In a 2015 document published after the Court's decision in this case, the Department of Finance indicated that it was "revisiting" the provisions at issue and "intends to bring forward new provisions for the legal profession that would be constitutionally compliant".⁸⁵

Even assuming that all solicitor-client privileged information could be appropriately protected, there remains something unsettling about a statutory regime that requires a lawyer, at the government's request, to record details about a client's identity and funds for reasons relating to a government policy objective and unrelated to the delivery of legal services to a client. A comparative fictional example might be a statutory regime that would require lawyers to read a government prescribed warning to all clients at the beginning of a retainer that reminded clients of the importance of paying all their taxes or, to take a government objective even further away from the legal realm, a government reminder to clients of the importance of maintaining their heart health. The fact that these fictional warning regimes would not result in disclosure of privileged information and do not appear to objectively interfere with how vigorously a lawyer would represent a client do not seem to render them unproblematic.

But, smell-test aside, what might be the problem with this type of government activity? The answer may lie in the need for clients to have confidence that the lawyers representing them are providing them with undivided loyalty. Stated otherwise, clients might not trust lawyers who are working simultaneously for them and the government in the context of the same retainer, even if the work for government does not touch on the legal services being delivered to the clients. As Binnie J. stated in *R. v. Neil*, one of the conflicts decisions cited by the majority in this case:

[The duty of loyalty] endures because it is essential to the integrity of the administration of justice and it is of high public importance that public confidence in that integrity be maintained Unless a litigant is assured of the undivided loyalty of the lawyer, neither the public nor the litigant will have confidence that the legal system, which may appear to them to be a hostile and hideously complicated environment,

⁸⁴ *Id.*, at paras. 65-66.

⁸⁵ Department of Finance Canada, *Assessment of Inherent Risks of Money Laundering and Terrorist Financing in Canada* (Ottawa: Department of Finance, 2015), at 32, fn 31.

is a reliable and trustworthy means of resolving their disputes and controversies.⁸⁶

This is perhaps what the majority was attempting to capture in this case by discussing the importance of client *perceptions* of government regulation of the legal profession. As noted above, in explaining the scope of the duty of commitment to a client's cause, the majority decision states:

... In the context of state action engaging s. 7 of the *Charter*, this means at least that (subject to justification) the state cannot impose duties on lawyers that undermine the lawyer's compliance with that duty, either in fact ***or in the perception of a reasonable person, fully apprised of all of the relevant circumstances and having thought the matter through.***⁸⁷

This additional layer now seems to change the structure of the argument into:

- (1) X (*i.e.* a law regulating lawyers) is unconstitutional if,
- (2) X engages lawyer's life, liberty or security interest; and
- (3) X requires Y, which the reasonable person would perceive as undermining the lawyer's commitment to a client's cause (regardless of whether it in fact does).

Although client trust may be at the heart of the issue here, the Court's use of client perceptions as an evaluative measure is curious, especially given the fact that the Court's evaluation of other regulatory efforts involving the legal profession focuses on objective risks of impaired representation. For example, the Supreme Court of Canada's jurisprudence in relation to law office searches is concerned with the potential of privileged information, in fact, being disclosed.⁸⁸ Similarly, the Court's jurisprudence relating to conflicts of interests is considered with "real risks" of prejudice — for example, in *Canadian National Railway Co. v. McKercher LLP*, a unanimous Court held that when a law firm is asked to act against an existing client on an unrelated matter that

⁸⁶ *R. v. Neil*, *supra*, note 71, at para. 12. The inspiration for including this passage in a discussion regarding lawyer independence is an article by Roy Millen which cites the same paragraph (Roy Millen, "The Independence of the Bar: An Unwritten Constitutional Principle" (2005) 84 Can. Bar Rev. 107).

⁸⁷ *Federation of Law Societies* *supra*, note 2, at para. 103 (emphasis added).

⁸⁸ *Lavallee*, *supra*, note 49.

falls outside of the “bright line rule”, the operative question is whether “a substantial risk of impaired representation” will be created if the law firm takes on the new retainer.⁸⁹

3. A Way Forward

If self-regulatory standards, solicitor-client privilege or client perceptions are all poor ways of thinking through what is at stake in a case like this, what is the alternative? The most coherent argument, I believe, can be found by looking back to independence of the bar and attempting to infuse that concept with more meaning rather than turning the concept of commitment to a client’s cause. In this regard, Alice Woolley has offered some particularly cogent suggestions in her analysis of independence of the bar as a constitutional principle.⁹⁰ As a matter of constitutional law she argues, *inter alia*:

[A] court reviewing state action that inhibits a person’s ability to access the advice, advocacy or argument of a lawyer ought to be concerned about the constitutional legitimacy of that action. Where the inhibition is material and does not itself further rule of law values (e.g., by ensuring a lawyer’s advice stays within the bounds of legality), the inhibition should be viewed as *prima facie* unconstitutional. The inhibition may be justifiable if it protects important substantive legal norms, but those would be exceptional cases, akin to the privilege exception for the prevention of an imminent risk of serious injury to an identifiable group.⁹¹

Woolley’s discussion of “rule of law values” is sophisticated, drawing on the work of Jeremy Waldron. However, in brief, one way to understand what she means when referring to lawyer regulation that furthers rule of law values is to understand it as “regulation that facilitates lawyers’ accomplishment of their various functions within the legal system would enhance the functioning of law”.⁹² Regulation that

⁸⁹ *McKercher, supra*, note 71.

⁹⁰ Alice Woolley, “Lawyers and the Rule of Law: Interdependence of the Bar, the Canadian Constitution and the Law Governing Lawyers” (2015) 34 N.J.C.L. 49.

⁹¹ *Id.*, at 72.

⁹² *Id.*, at 67. For some, this description of “rule of law values” may be too procedurally focused and it is worth noting that the very concept of “rule of law” is, of course, contested (for discussion on this point, see, for example, Alice Woolley & Trevor Farrow, “Addressing Access to Justice Through New Legal Service Providers: Opportunities and Challenges” (2016) 3 Texas A&M L. Rev. 549, at 556-64). The argument here, however, does not turn so much on whether a certain set of legal constraints can be labelled in reference to “the rule of law” but rather in the distinction

would fit in this category would include, for example, the duty that a litigator has to disclose adverse authority or the duty to be civil even in cases where rudeness might more effectively advance a client's cause.⁹³

Framing this in terms of client trust, it is possible to see how lawyer regulation that aims to facilitate lawyers fulfilling their role in the legal system (by not, for example, concealing relevant precedent or bullying other lawyers or opposing parties), would not reasonably detract from a client's perception of his or her lawyer as a trusted and loyal advisor helping him or her navigate the legal system.

Although Woolley argues that independence of the bar, understood as set out in the quotation from her above, "ought to be recognized ... as an aspect of [section 7]", she does not focus in her article on the details of how this recognition should be manifest. Here, I would like to suggest that: (1) the independence of the bar ought to be recognized as a principle of fundamental justice; (2) the rule of law values that Woolley discusses be built into our understanding of the independence of the bar as a principle of fundamental justice; and (3) the question of the extent to which "other substantive legal norms" operate to justify state intrusions on the lawyer-client relationship in "exceptional cases" be considered under section 1. To go back to our argument diagramming, we would then be left with the following as a section 7 analysis:

- (1) X (*i.e.*, a law regulating lawyers) is unconstitutional if,
- (2) X engages lawyer's life, liberty or security interest;
- (3) X requires Y, which intrudes on the lawyer-client relationship; and
- (4) Y is not related to rule of law values (*i.e.*, facilitating the lawyer's role in the legal system).

There would still be room to consider under section 1 whether the state regulation furthers other important government policy objectives such that the intrusion should be exceptionally justified. Two advantages to considering such other intrusions under section 1 are that: (1) the jurisprudence already incorporates the concept of exceptionality when

between constraints that are directed to a lawyer acting properly in his or her role *qua* lawyer as opposed to constraints that further other governmental ends (like, for example, promoting public health or preventing terrorism).

⁹³ For discussion of these duties, see, for example, Stephen G.A. Pitel & Yu Seon Gadsden-Chung, "Reconsidering a Lawyer's Obligation to Raise Adverse Authority" (forthcoming) and Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007) 11 Can. Crim. L. Rev. 97.

considering section 7 violations under section 1; and (2) proportionality would be explicitly incorporated into the analysis.

V. CONCLUSION

In *Canada (Attorney General) v. Federation of Law Societies of Canada*, the Supreme Court of Canada resolved a multi-year dispute between the federal government and Canadian law societies about how lawyers should be regulated in order to combat money-laundering and terrorist financing. The outcome should provide lawyers with some relief that the courts will not lightly allow the state to interfere in their relationships with their clients. However, as elaborated above, there are reasons to be concerned with whether the majority's decision provided a solid jurisprudential basis for the result reached.

It remains to be seen what broader consequences the holding in this case will have for the future judicial regulation of lawyers. It is possible that we will not have to wait too long to find out if the new Liberal government follows through on its predecessor's promise last year to introduce amendments that would, in its view, allow the Regime to apply to lawyers in a constitutionally compliant manner.⁹⁴ *Canada (Attorney General) v. Federation of Law Societies of Canada, Round 2*, may be just around the corner.

⁹⁴ Department of Finance Canada, *Assessment of Inherent Risks of Money Laundering and Terrorist Financing in Canada* (Ottawa: Department of Finance, 2015), at 32, fn 31.

